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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

TAKE-TWO INTERACTIVE SOFTWARE, INC. and 2K GAMES, INC.)	CASE NO.: 3:20-CV-4441
)	
)	
Plaintiffs,)	COMPLAINT FOR DECLARATORY JUDGMENT
v.)	
)	
BRANDON SIMS,)	
Defendant.)	

Plaintiffs Take-Two Interactive Software, Inc. (“Take-Two Interactive”) and 2K Games, Inc. (“2K Games”) (collectively, “Take-Two”), by and through their attorneys, Kirkland & Ellis LLP, for their Complaint, hereby allege against Defendant Brandon Sims (“Sims” or “Defendant”) as follows:

NATURE OF THE ACTION

1. Take-Two has been forced to bring this declaratory judgment action to clear the cloud that Defendant has created over Take-Two’s well-known basketball simulation video game, *NBA 2K19*. As discussed in detail below, in *NBA 2K19*, users can explore the game’s fictional narrative and play

1 virtual basketball against a variety of opponents, including real-world basketball players. The game also
2 allows them to create and customize their fictional players, including by unlocking and using a variety
3 of celebratory, pre-programmed dances that trigger when players score points on the basketball court.
4 As a result, just as a basketball player in the real world might celebrate with a dance after making a
5 basket, in *NBA 2K19*, users can cause their basketball players to celebrate in various ways. One such
6 celebratory dance is an eight-second animation consisting of the basketball player hopping sideways on
7 straight legs (one on the ground and one in the air), while raising his arms to eye level in the direction
8 away from the hop, then repeating the movement on the other foot (the “Take-Two Dance Step”).

9 2. Seeking undeserved fees from Take-Two, Defendant has claimed in multiple letters that
10 the Take-Two Dance Step infringes his alleged copyrights in an 82-second choreographic work called
11 “Crank That Dance,” which features three dancers performing a variety of dance steps while changing
12 formations throughout. Defendant, however, appears to be basing his claim on just one, individual
13 dance step, in which the three dancers in close quarters stand in a straddle position with their legs bent as
14 if riding a motorcycle, with their arms at chest level, pumping their hands like they are cranking the
15 throttle of the motorcycle (the “Sims Dance Step”).

16 3. The central failure of Defendant’s claim is that **no one can own a dance step**. This is a
17 critical tenet of copyright law. Dance steps are building blocks used to create choreographic works, not
18 choreographic works themselves. Like colors and geometric shapes (neither of which is protectable on
19 its own), dance steps must be free for anyone to use to create their own dances. Thus, the distinction
20 between individual dance steps and choreographic works is an important feature of copyright law’s
21 accommodation of the First Amendment’s free speech guarantee.

22 4. For that reason, Congress and the Copyright Office are clear that dance steps are not
23 protected by copyright law. As Take-Two will show in the course of this lawsuit, although Congress
24 extended copyright protection to choreographic works, it specifically excluded “simple routines” from
25 that definition. Thus, as the Copyright Office has explained in its *Compendium of U.S. Copyright Office*
26 *Practices*—the Copyright Office’s substantive manual for its staff on the contours of copyright law and
27 Copyright Office policies—although a “composition and arrangement of ‘a related series of dance
28 movements and patterns organized into a coherent whole’” may be copyrightable as a choreographic

work, Compendium § 805.1, “[i]ndividual movements or dance steps by themselves are not copyrightable.” *Id.* § 805.5(A). As the Sims Dance Step is nothing more than an individual dance step, it is not protectable.

5. In addition to being an unprotectable dance step, Defendant cannot claim copyright protection in the Sims Dance Step because, upon information and belief, it was not independently created, as is required to be copyrightable. Instead, Defendant copied his dance step from a prior social dance known as the “crank”—it is so named because it resembles riding and cranking the throttle of a motorcycle. The song on which Defendant’s “Crank That Dance” routine is based, Soulja Boy’s “Crank That (Soulja Boy),” references this preexisting social dance in its title and lyrics. Defendant appears to have copied the “crank” in creating the “Crank That Dance.”

6. In any case, as shown below and in the attached videos, the Sims Dance Step and the Take-Two Dance Step are different. For example, the Sims Dance Step is performed by three dancers with their legs bent in a straddle stance, mimicking riding a motorcycle. By contrast, the Take-Two Dance Step is performed by a single celebrating basketball player with straight legs, one of which is on the ground and the other raised in the air. Likewise, the arms in the dance steps are different. In the Sims Dance Step, they are tightly curled at chest level to simulate holding handlebars, whereas the arms in the Take-Two Dance Step are outstretched at or above the head. Finally, whereas the Sims Dance Step’s dancers bounce in place or slightly backward simulating the acceleration of the throttle, the Take-Two Dance Step’s basketball player makes large, fluid lateral motions to the side.

The Sims Dance Step



The Take-Two Dance Step





7. Take-Two explained the foregoing to Defendant, but he has persisted in his meritless position and continues to demand money. As a result of Defendant's intransigence, Take-Two had no choice but to seek an order from this Court declaring that the Take-Two Dance Step does not infringe any copyrights held by Defendant. Moreover, to deter such unreasonable claims in the future, Take-Two seeks its attorneys' fees in bringing this lawsuit.

THE PARTIES

8. Plaintiff Take-Two Interactive Software, Inc. is a Delaware corporation with its principal place of business located in New York. It is a multinational publisher, developer, and distributor of video games and video game peripherals.

9. Plaintiff 2K Games, Inc. is a wholly-owned subsidiary of Take-Two Interactive Software, Inc. It is a Delaware corporation with its principal place of business located in this District, and an address in Novato, California.

10. Upon information and belief, Defendant Brandon Sims is an individual residing in Lithonia, Georgia. He has recorded music and performed under the name "Lil Playboii."

JURISDICTION AND VENUE

11. This is an action arising under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Copyright Act, 17 U.S.C. §§ 101 *et seq.*

12. This Court has subject matter jurisdiction under 28 U.S.C. §§ 2201 and 2202 because there is a substantial and concrete controversy between the parties of sufficient immediacy that warrants a declaratory judgment. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1338 because this matter involves an action arising under the Copyright Act.

13. This Court has personal jurisdiction over Defendant and venue is proper in this District because, upon information and belief, Defendant has the minimum contacts required to warrant this Court's exercise of jurisdiction. Specifically, Defendant has directed his activities and performed actions within this District, thereby invoking the benefits and protections of its laws.

14. Of particular relevance to this litigation, Defendant has asserted that he was a dancer for well-known rapper Soulja Boy, on whose “Crank That (Soulja Boy)” song Defendant’s alleged dance is based. Upon information and belief, in that role, Defendant traveled to this District and performed the Sims Dance Step at the then-named Oracle Arena as part of Soulja Boy’s concert tour. Defendant also sent his letter asserting infringement to Take-Two’s employees in this District, which serves as further evidence that Defendant has the contacts within this District necessary to support jurisdiction. Further, Take-Two anticipates that discovery will reveal additional connections to this District arising out of or related to Defendant’s copyright claim. As a result, it is reasonable for this Court to exercise jurisdiction over Defendant.

ALLEGATIONS

PLAINTIFFS AND THEIR NBA 2K VIDEO GAME SERIES

15. *NBA 2K19* was released in the United States on September 11, 2018 for PC, Nintendo Switch, PlayStation 4, and Xbox One.

16. *NBA 2K19* is a creative work, reflecting creative choices in, among other things, its characters, setting, plot, graphics, animations, music, dialogue, and other expressive elements.

17. *NBA 2K19* is a basketball simulation game. The twentieth installment of the popular *NBA 2K* series, *NBA 2K19* realistically depicts over 400 real-life professional basketball players from the NBA. Within the game, a user can play virtual basketball, either solo or against other players. The game features numerous realistic elements, including cheer squads, mascots, the sound of sneakers squeaking on the court, crowd interactions, announcers and sportscasters—everything to evoke the feel of a real-life professional basketball game. In addition to the virtual basketball gameplay, users can customize fictional players in appearance, skills, clothing, and personality.

18. Moreover, users can select celebratory dances for players to perform when they score points in a game, as real-life basketball players often do. These dances are short animations that can be used with any player.

19. The Take-Two Dance Step, which is titled “Soul Jah Boi” in the game, is just one of these dances, and consists of eight seconds of pre-programmed animation. When a user performs it, for eight seconds, his or her basketball player makes a lateral motion to the side four times. One leg is straight on the ground, while the other leg is outstretched. Both arms are held in the air in front of the head. A true and correct copy of a gameplay capture video for the Take-Two Dance Step is attached hereto as **Exhibit 1**, a screenshot from which is depicted at right.



DEFENDANT AND HIS DANCE STEP

20. Upon information and belief, Defendant is a rapper in Atlanta, Georgia. Under the name “Lil Playboii,” Defendant formed the group Cash Camp with his brother, Trenton James (aka “Yella Boy Trent”).

21. On April 19, 2011, Defendant received a registration from the Copyright Office for a work titled “Crank That Dance.” To register the work, Defendant deposited with the Copyright Office an 82-second recording of him, Mr. James, and another individual performing a routine in sync with the “Crank That (Soulja Boy)” song. The recording features the three dancers performing a variety of different moves in sequence—often with the dancer in the center performing a move distinct from the dancers on the left and right—as the screenshots below show.





A true and correct copy of the deposit copy is attached hereto as **Exhibit 2**.

22. The Copyright Office granted a registration for the entire routine. That registration, however, does not extend to the individual dance steps independent of the work as a whole. Yet, Defendant's copyright infringement claim appears to be based on only the Sims Dance Step, one step in the longer work, which is performed at 0:05 in the deposit copy. A screenshot of the Sims Dance Step appears at right.



23. The Sims Dance Step takes roughly one second to perform. The three dancers are shown close together, with tightly packed arms bent at the elbows. Each dancer's legs are bent in a straddle stance. The dancer's arms are curled near the chest, and pump vigorously to evoke "cranking" the throttle on a motorcycle as the dancer bounces backward.

24. Other variations of the Sims Dance Step appear later in the recording at 0:18, 0:31, and 1:13. They also feature a series of short bounces backwards, rotating fists, and pumping elbows to evoke revving a motorcycle.

25. Upon information and belief, Defendant did not create the Sims Dance Step. Instead, he copied it from a preexisting social dance known as the "crank."

26. "Cranking" was popular in the Southern hip-hop scene in the mid-2000s, and originally was popularized in the 2006 music video for the song "It's Goin' Down" by the Atlanta rapper, Yung Joc. A true and correct copy of Mr. Joc's music video is attached hereto as **Exhibit 3**.

27. As shown at right and throughout Mr. Joc’s video, Mr. Joc and groups of friends perform the “crank,” leaning back, holding out their arms in front of their chests, and bending their elbows slightly as if they are grabbing onto handlebars. Mr. Joc and his friends curl their fists in a rotating motion as they bounce back and forth on their back foot, to evoke rhythmically the acceleration from revving the throttle.



THE SIMS DANCE STEP IS NOT COPYRIGHTABLE

28. As mentioned above, Defendant’s registration for the 82-second “Crank That Dance” does not mean that the Sims Dance Step is protected by copyright law. It is not for three reasons.

29. First, the Sims Dance Step was not independently created. Instead, upon information and belief, Defendant copied it from the preexisting social dance, the “crank.” As the Sims Dance Step was not original to Defendant, he holds no copyright in it.

30. Second, as discussed above, the individual dance steps that make up a choreographic work are not individually copyrightable. In enacting the Copyright Act, Congress explicitly stated that “simple routines” are not choreographic works and are not copyrightable subject matter. H.R. Rep. 94-1476, at 53–54. Moreover, the Copyright Office has explained that choreography is the “composition and arrangement of ‘a related series of dance movements and patterns organized into a coherent whole.’” Compendium § 805.4(A). By contrast, “[i]ndividual movements or dance steps by themselves are not copyrightable,” nor are “short dance routines consisting of only a few movements or steps with minor linear or spatial variations.” *Id.* § 805.5(A). The Sims Dance Step is an unprotectable individual dance step, and based on the Copyright Office’s Compendium, the Office would not have registered the Sims Dance Step alone. Indeed, to allow protection over an individual building block of choreographic expression would prevent anyone else from using it, thus chilling creativity and hampering free speech.

31. Third, the Sims Dance Step is an unprotectable idea. Defendant cannot own the idea of extending the arms across the body while leaning back. Nor can Defendant own the idea of rotating fists in order to evoke the throttle of a motorcycle.

32. After filtering out the copied expression, unoriginal building blocks, and unprotectable ideas, there are no protectable elements of the Sims Dance Step to compare to *NBA 2K19*.

THE WORKS ARE DIFFERENT, AND SO ARE THE DANCE STEPS

33. Even if the works were compared, there is no similarity. The work that Defendant deposited with the Copyright Office is an 82-second routine of many dance steps performed by three dancers in a line to the song “Crank That (Soulja Boy).” This routine is not present in *NBA 2K19*, nor does Defendant assert that it is. “Crank That (Soulja Boy)” is not even on *NBA 2K19*’s soundtrack.

34. Even comparing the Sims Dance Step and the Take-Two Dance Step, they are different.

35. As an initial matter, the Sims Dance Step is performed by three dancers closely packed together, but the Take-Two Dance Step is performed by one basketball player.

36. Further, the movements are distinct. The Sims Dance Step is performed with bent legs in a straddle stance, as if sitting on a motorcycle, bouncing either in place or backwards, with the arms close to the chest, and the hands pumping as if revving a throttle. By contrast, the Take-Two Dance Step is performed with one straight leg making large, lateral movements to the side, and the other straight leg extended in the air, while the arms are fully extended and raised to eye level.

The Sims Dance Step



The Take-Two Dance Step



THERE IS AN ACTUAL CONTROVERSY BETWEEN THE PARTIES

37. On April 2, 2020, Defendant’s counsel sent Take-Two a letter (the “April 2 Letter”), asserting that Take-Two had infringed Defendant’s copyrights and that Take-Two needed to pay Defendant an unidentified amount of money.

38. On May 21, 2020, Take-Two (through outside counsel) responded (the “May 21 Response Letter”), explaining in detail that Defendant’s infringement claim is without merit.

39. On June 15, 2020, Defendant's counsel nevertheless sent another letter, reiterating Defendant's claim that Take-Two's use was infringing and demanding that Take-Two obtain a license from Defendant.

40. Defendant's letters have given rise to uncertainty and controversy with respect to Take-Two's ongoing right to offer the Take-Two Dance Step in *NBA 2K19*. Thus, Take-Two seeks to resolve this dispute as promptly as possible so that it can focus on creating innovative video games that entertain players without the threat of Defendant's infringement allegations.

41. To resolve the claims raised by Defendant and to afford relief from the uncertainty and controversy caused by Defendant's actions, Take-Two is entitled to a declaratory judgment that *NBA 2K19* does not infringe any copyright that Defendant may own.

42. Defendant's assertion that Take-Two has infringed his copyrights adversely affects Take-Two. Unless resolved by the Court, the uncertainty and controversy between the parties will continue to harm Take-Two.

CLAIM FOR RELIEF

COUNT I

(Declaratory Judgment of Non-Infringement of Copyright)

43. Take-Two repeats and realleges each and every allegation above as if fully set forth herein.

44. Defendant claims to own the copyright for the "Crank That Dance," and alleges that *NBA 2K19* infringes his copyright thereto by offering the Take-Two Dance Step.

45. The Take-Two Dance Step does not infringe Defendant's claimed copyrights because, among other things, Defendant copied the Sims Dance Step from the preexisting "crank" social dance, and the two dance steps are not substantially similar as a matter of law.

46. Because Defendant has threatened Take-Two with an infringement claim over the Take-Two Dance Step, and because a declaration by this Court that *NBA 2K19* does not infringe Defendant's alleged copyright in the "Crank That Dance" will allow the continued distribution of *NBA 2K19* with the Take-Two Dance Step to continue without disruption and fear of litigation, Take-Two is entitled to a declaratory judgment of non-infringement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Take-Two Interactive and 2K Games respectfully request judgment against Defendant Sims as follows:

47. Find and declare that *NBA 2K19* does not infringe any copyrights held by Defendant;

48. Award Take-Two costs and distributions in this action, including reasonable attorney's fees pursuant to 17 U.S.C. § 505; and

49. Grant such other, further, and different relief as the Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Take-Two demands trial by jury on all issues so triable in this action.

DATED: July 2, 2020

Respectfully submitted,

/s/ Dale M. Cendali

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